Embassy of Finland v Cosworth Management Services (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANY DISSOLUTION NO 28–521 OF 1998

ABDUL WAHAB PATAIL J

25 APRIL 2000

Company Law — Winding-up — Petition — Objections against winding-up — Whether petition ought to be granted

The petitioner — the Embassy of Finland — was awarded damages, costs and interests in a civil action against the respondent. The respondent failed to pay the judgment sum or the sum demanded by the petitioner in the s 218 notice issued under the Companies Act 1965. The petitioner thus applied to wind-up the respondent. The respondent opposed the petition on two grounds, viz: (1) the judgment obtained against it was on uncertain terms; and (2) the petitioner was not a legal entity and thus had no capacity to sue. The respondent had failed to make any payment or to set aside the judgment obtained by the petitioner.

Held, dismissing the respondent's objections and allowing the petition:

(1) In the instant case, there was no suggestion the respondent had offered to pay even the principal sum. The uncertainty as to the interest could not excuse payment upon the principal sum. In the circumstances, the respondent's failure to pay the undisputed part of the debt being the principal sum of RM18,750, or any part thereof, indicated on its part simple reliance upon a mere technicality as an excuse for non-payment; rather than genuinely not being able to make payment because of uncertainty concerning the sum to be paid (see para 9).

(2) The term 'embassy' is not only used to describe the residence and offices of an ambassador, but is also used to collectively describe the ambassador and the staff that support him (see para 12).

(3) It was clear from the affidavit evidence and annexed exhibits that the Republic of Finland treated the Embassy of Finland in Kuala Lumpur as a juristic person and a legal entity capable of representing it. Further, there was a tenancy agreement executed between the parties to show that the respondent had in fact accepted that the Embassy of Finland was a legal entity. This fact added no merit to the respondents' objections. It was thus right and proper that the respondent be estopped from raising such objection (see para 13); *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 referred.

[**Bahasa Malaysia summary**

Pempetisyen — Embassy of Finland — diawardkan gantirugi, kos dan faedah dalam satu tindakan sivil terhadap responden. Responden gagal membayar jumlah penghakiman atau jumlah yang dituntut oleh pempetisyen dalam notis s 218 di bawah Akta Syarikat 1965. Oleh itu pempetisyen memohon untuk mengulungkan responden. Responden membantah kepada petisyen itu atas dua asas, iaitu: (1) penghakiman terhadapnya berdasarkan terma-terma yang tidak jelas; dan (2) pempetisyen bukan satu entiti undang-undang dan oleh itu tidak mempunyai keupayaan untuk mendakwa. Responden gagal untuk membuat sebarang bayaran atau menolak penghakiman yang diperoleh oleh pempetisyen.

Diputuskan, menolak bantahan responden dan membenarkan petisyen itu:

(1) Dalam kes ini, tiada cadangan bahawa responden telah menawarkan untuk membayar walaupun jumlah pokok. Ketidaktentuan faedah tidak boleh digunakan sebagai alasan untuk tidak membayar di atas jumlah pokok. Dalam keadaan ini, kegagalan responden untuk membayar sebahagian hutang yang tidak dipertikaikan iaitu jumlah pokok sebanyak RM18,750, atau mana-mana bahagian daripadanya, menunjukkan ia bergantung pada perkara teknikal semata-mata sebagai alasan untuk tidak membayarnya; dan bukannya secara jujur tidak dapat membuat bayaran akibat daripada ketidaktentuan berkenaan dengan jumlah yang patut dibayar (lihat perenggan 9).

(2) Terma 'embassy' bukan sahaja digunakan untuk menerangkan tempat tinggal dan pejabat seorang duta tetapi juga secara keseluruhannya menerangkan duta tersebut dan juga kakitangan sokongannya (lihat perenggan 12).

(3) Ianya jelas daripada keterangan afidavit eksibit yang dilampirkan bahawa Republik Finland menganggap Kedutaan Finland di Kuala Lumpur sebagai satu badan yang mempunyai bidangkuasa (juristic person) dan satu entiti undang-undang yang berupaya untuk mewakilinya. Tambahan pula, terdapat satu perjanjian sewa yang ditandatangani oleh kedua-dua pihak untuk menunjukkan bahawa responden sememangnya menganggap bahawa Kedutaan Finland adalah satu entiti undang-undang. Fakta ini tidak menambah apa-apa merit kepada bantahan responden. Oleh itu, adalah adil dan betul agar responden dihalang daripada membangkitkan bantahan sebegitu (lihat perenggan 13); *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 dirujuk.

Notes

For cases on objections against winding-up petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152–1219.

Cases referred to

A Company, Re [1994] 1 WLR 1090 (refd)
Allied Co v Netherlands Indies Government [1948] MLJ 64 (refd)
Badiaddin bin Mohd Mahidin v Arab Malaysia Finance Bhd [1998] 1 MLJ 393 (refd)
Deputy Commissioner of Taxation v Cye International Pty Ltd (No 2) [1986] 10 ACLR 305 (refd)
EU Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37 (refd)
Krajina v The Tass Agency and Anor [1949] 2 All ER 274 (refd)
Oriental Bank Bhd v CSJ Pengangkutan Sdn Bhd (formerly known as Syarikat Pengangkutan Chua Seng Joo Sdn Bhd) [1989] 2 CLJ 1076 (refd)
Perusahaan Jenwatt Sdn Bhd, Re [1990] 1 CLJ 491 (refd)
Processed Sand Pty Ltd v Thiess Contractors Pty Ltd, Breen Holdings Pty Ltd v Thiess Contractors Pty Ltd [1983] 1 ACLC 1069 (refd)
Sungei Rinching Sdn Bhd v Sri Keluarga Sdn Bhd [1996] 2 MLJ 199 (refd)
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701 (refd)
Tweeds Garages Ltd, Re [1962] Ch 406 (refd)
YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) [1996] 2 MLJ 482 (refd)
Yzguierda v Clydebank Engineering a Shipbuilding Co [1902] AC 524 (refd)

Legislation referred to

Companies Act 1965 s 218(2)(a)
Companies Act 1981 [Aus] s 364(2)

Shahriza Zaliha bte Abdul Shukor (Bhadarul Baharain & Maizura) for the petitioner.
T Gunaseelan (Jayaraman, Ong & Co) for the respondent.

Abdul Wahab Patail J:

[1] The embassy of Finland has filed a petition that Cosworth Management Services (M) Sdn Bhd formerly known as Good Management Services Sdn Bhd be wound-up under the provisions of the Companies Act 1965, upon grounds it is just and equitable to do so. A notice under s 218 dated 30 December 1995 had been sent to the respondent demanding payment within 21 days of a debt of RM18,750 in damages, interest at the rate of 8% per annum from 31 August 1991 until the date of full settlement, together with costs of RM601. These sums were due to the petitioner pursuant to the order of the Magistrate Court, Kuala Lumpur made on 10 August 1994. In addition the petitioner sought the appointment of the Official Receiver as the provisional receiver and that costs of the petition be paid out of the assets of the respondent company.

[2] The respondent objects on two grounds. One of the arguments is that the debt is disputed and that the judgment obtained were on terms that were uncertain. The order obtained on 10 August 1994 was obtained in default of appearance. The term of the order is as follows:

MAKA ADALAH PADA HARI INI DIHAKIMI SECARA PENGHAKIMAN INGKAR bahawa defendan hendaklah membayar kepada plaintif wang sebanyak RM18,750 DAN kos tindakan sebanyak RM601 DAN ADALAH AKHIRNYA DIHAKIMI bahawa defendan membayar faedah dengan kadar 8% setahun dari tarikh kemungkiran kontrak sehingga tarikh penyelesaian.

[3] The solicitor's letter of 29 January 1996 raised the argument that the interest is uncertain. Perusal of the magistrate's court order above shows no uncertainty as to the principal sum of RM18,750 and the rate of interest. However the order is unclear as to the date of the breach of contract, and the petitioner, other than stating the date of the breach as 31 August 1991 in the notice under s 218 has not clarified the matter. On the other hand the respondent through their solicitors on 29 January 1996 had objected on the notice under s 218 only on the grounds of nullity and uncertainty of the interest due. There is no application by the respondent to set aside the judgment in default. It is trite that an order of court remains in force until it is set aside.

[4] In *Re A Company* [1994] 1 WLR 1090 the amount due to the petitioner was uncertain. It was held that the petitioner could not make a genuine demand. In *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd, Breen Holdings Pty Ltd v Thiess Contractors Pty Ltd* [1983] 1 ACLC 1069, the Supreme Court of New South Wales decided that a notice of demand which claimed more than the amount actually due would not come within s 364(2) of the Companies Act 1981 and non compliance with it would not give rise to any deemed inability on the part of the company to pay its debt. Section 364(2) of the Companies Act is identical with the Malaysian s 218(2)(a). Similarly in *Deputy Commissioner of Taxation v Cye International Pty Ltd (No 2)* [1986] 10 ACLR 305, the Supreme Court of the New South Wales, decided that a demand for an additional sum over and above the amount which was due at the date of demand vitiated the notice as a proper demand under s 364 of the Companies (NSW) Code. The case of *Processed Sand Pty Ltd* was followed. On *Re Perusahaan Jenwatt Sdn Bhd* [1990] 1 CLJ 491, Zakaria J (as he then was) held, inter alia, that the notice of demand must comply strictly with the requirements of s 218(2)(a) of Companies Act 1965. Because the amount stated in the said notice was far in excess of the debt due, it was held the failure on the part of the company to pay the sum claimed did not mean that the company was unable to pay its debts.

[5] On the other hand, other authorities took a different and more practical approach. The *Oriental Bank Bhd v CSJ Pengangkutan Sdn Bhd (formerly known as Syarikat Pengangkutan Chua Seng Joo Sdn Bhd)* [1989] 2 CLJ 1076, was a case that involved interest was not quantified. Dzaiddin J (as he then was), in discussing the question, referred to *Re Tweeds Garages Ltd* [1962] Ch 406 which stated 'where there is no doubt at all and there is none here that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, the dispute as to the precise sum which is owed to him is not by itself a sufficient answer to his petition'. The court in *Oriental Bank Bhd v CSJ Pengangkutan*

Sdn Bhd held that the failure to quantify the amount of interest does not bar the court from issuing the winding-up order.

[6] More recent authorities took the more practical view. In *Sungei Rinching Sdn Bhd v Sri Keluarga Sdn Bhd* [1996] 2 MLJ 199 (CA), the Court of Appeal followed *Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 where at p 448 Salleh Abas LP held:

> In our judgment as the bet of $60580 is not disputed the respondent company caught under s 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its position so that the court would be able to consider the evidence and determine whether it should exercise its discretion to order winding-up or not to order it. If an order of winding-up is made, the respondent company can still defend on the balance amount in dispute.

[7] In *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 (CA), Ahmad Fairuz Sheikh Abdul Halim JCA took a similar practical approach, concluding:

> What is obvious from the two issues raised by the learned counsel for the appellant is that the issue are on matters of technicalities. On this the learned Kaikaus J said, 'The English system of administration of justice on which our own is based, may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantial rights is defective to that extent. The ideal must always be a system that gives to every person what is his' (*Imtiaz Ahmad v Ghulam Ali* PLD 1963 SC 382 at p 400). Admittedly, what had been uttered by the learned Judge Kaikaus pertains to or was in context of civil procedure. But what is important is the principle on technicality in the system of justice. In this appeal, what has not been quantified is the interest on the principal amount. The question that arises is whether the petition should be dismissed merely on that ground, when it is clear that the principal amount stated in the notice has not been disputed and the quantum stated in the notice was a quantum which was far more than RM500. Similar issues arises concerning the verifying affidavit which contained the same date as that contained in the petition. Is it just that the petition be dismissed only for the reason that the date was one which was not dated after a date stated in the petition itself. The substantive matter in this appeal is the capability of the appellant in paying its debts, and there was no evidence that had been awarded that could show the capability of the respondent company in paying off its debts. Because of that I am respectfully of the view that this appeal should be dismissed with cost and the deposit to be given to the respondent to account of taxed costs. It must also be remembered that what occurred in this appeal is that the quantum of the interest would be arrived at after a calculation is made and that the quantum does not inflate the debt to a figure that exceeds the total debt owed by the company as in the case from Australia, *Re Tweeds Garages, Re Perusahaan Jenwatt Sdn Bhd* and *Re Yap Kim Kee and Sons Sdn Bhd* referred to above.

[8] In *Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84. The issue was placed in its true perspective, is that:

> It is not the neglect to meet the demand of the creditor that gives the jurisdiction to the court to order that the company be wound up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that give the court the jurisdiction. This presumption is rebuttable.

[9] In other words the court must consider why the sum is not paid and to draw the reasonable inferences from the fact, if established of non-payment. In this case the liability for the sum of RM18,750 was not disputed as such. It is a sum well in excess of the lower limit. There is no suggestion the respondent had offered to pay the sum of RM18,750. The uncertainty as to the interest cannot excuse payment upon the principle sum. In the circumstances, the respondent not having paid the undisputed part of the debt being the principle sum of RM18,750, or any part thereof, indicates on the part of the respondent a simple reliance upon technicality as an excuse for non-payment rather than genuinely being not able to make payment because the respondent does not know the sum to be paid.

[10] The second argument on grounds of nullity is based on the argument that the Embassy of Finland is not a legal entity known to law and therefore is incompetent to sue. Notwithstanding the notice given to the petitioner had proceeded with filing this petition with the Embassy of Finland as petitioner. Such a question is a question which must be determined according to the laws of Finland: see *Krajina v The Tass Agency & Anor* [1949] 2 All ER 274. Upon the objection to file further affidavit and to enable further submissions on the capacity of the Embassy of Finland to sue.

[11] The petition for winding-up was made not by the Government of Finland but by 'The Embassy of Finland'. The judgment obtained in the Magistrate Court Kuala Lumpur was in the name of 'The Embassy of Finland'. This however does not prevent the respondent from attacking the judgment in collateral proceedings by raising the objection as in this case, that it void and illegal: see *Badiaddin bin Mohd Mahidin v Arab Malaysia Finance Bhd* [1998] 1 MLJ 393 (FC) 409, 425-426; *EU Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 (FC). The tenancy agreement between the parties was also in the name of 'The Embassy of Finland'. The cases *Allied Co v Netherlands Indies Government* [1948] MLJ 64; *Yzquierda v Clydebank Engineering a Shipbuilding Co* [1902] AC 524 are of limited assistance since the matter before the court does not involve the Republic of Finland directly as such, but whether the Embassy of Finland is a legal entity capable of entering into an agreement and to sue thereon.

[12] Generally an embassy is a deputation or mission by a country to a foreign country and is derived from the fact that such deputation or mission is led by the ambassador. Though the term 'embassy' is also used to describe the residence and offices of an ambassador, the term is also used to collectively

describe the ambassador and the staff that supports him: see *Oxford Advance Learner's Dictionary of Current English* (5th Ed). Thus in my view the Embassy cannot be separated from the ambassador and derives its juridical existence from the ambassador. The statement by the Ministry of Foreign Affairs of the Republic of Finland is consistent with this usage of the term 'Embassy'. The two affidavits sworn by His Excellency Erkki Huittinen the ambassador of Finland (encl 23 and 24) exhibited letters of confirmation that:

> The Ministry of Foreign Affairs of Finland hereby states, that the Embassy of Finland in Kuala Lumpur is authorised to represent the Government of Finland as the above mentioned case (encl 23).
>
> That the Ministry of Foreign Affairs of Finland hereby states that the Embassy of Finland in Kuala Lumpur is authorised to represent the Republic of Finland in instituting and reinstating legal proceedings against Cosworth Management Services (M) Sdn Bhd pursuant to a Tenancy Agreement dated 14 December 1989 between the Embassy of Finland and Cosworth Management Services (M) Sdn Bhd (encl 24).

[13] Both letters by the Ministry of Foreign Affairs were signed by the Director General of the Ministry of Foreign Affairs of Finland. The second letter in addition the signature of the Legislative Secretary. These letters were produced by His Excellency the ambassador himself. There is no doubt therefore as to their authenticity and correctness as to the status and authority of the Embassy of Finland as viewed under the laws of the Republic of Finland. By treating the Embassy as authorised to represent the Republic of Finland, the Republic of Finland treats the Embassy of Finland in Kuala Lumpur as a juristic person and therefore a legal entity capable of representing it.

[14] In *Krajina v The Tass Agency & Anor*, the Court of Appeal reasoned that the ambassador having issued a certificate that the Tass Agency was a department of the Soviet State, the burden of disproving that the agency was a department of the Soviet State was on the plaintiff.

[15] The letters from the Ministry of Foreign Affairs of Finland is of similar effect particularly since they are produced by way of affidavit of the ambassador of Finland. There being no evidence put before the court by the respondent to say that the ministry of foreign affairs of Finland is wrong in treating that Embassy of Finland as a legal entity under the laws of Finland. The court holds that the tenancy agreement, the judgment obtained in the magistrates court and this petition before the court are valid.

[16] In addition the tenancy agreement between the parties show that the respondent had also in fact accepted that 'the embassy of Finland is a legal entity. This fact adds no merit to the respondents' objections and it is right and proper that the respondent be estopped from raising the objection (see *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 (CA).

[17] The court therefore dismissed the objections raised. In all the circumstances of this case the court concludes that the petitioner has shown that the respondent is unable to pay its debts and that is just and equitable that the respondent be wound up.

Petitioner's petition allowed.

Reported by John Paul Simon